SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1967

No. ~~1363~~ 136

ANGELO MINICHIELLO,

Petitioner,

against

ROYAL BUSINESS FUNDS CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE COUNTY OF NEW YORK, TO REVIEW AN ORDER AND DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE COUNTY OF NEW YORK, TO REVIEW AN ORDER AND DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioner, Angelo Minichiello, prays that a writ of certiorari issue to review the order and decision of the Court of Appeals of the State of New York filed in the above-entitled cause on December 30, 1966.

Opinions Below

The decisions below are reported at 47 Misc. 2d 310, 262 N.Y.S. 2d 708 (Sup. N. Y. 1965); *aff'd*, 25 A. D. 2d 502, 266 N.Y.S. 2d 570 (1st Dept. 1966), *rev'd*, 18 N. Y. 2d 521, 277 N.Y.S. 2d 268, 223 N. E. 2d 793 (1966).

Jurisdiction to Grant Certiorari

The order of the Court of Appeals was entered on December 30, 1966. A motion for reargument filed on February 9, 1967, was denied on March 2, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented

(1) In overturning a century-old doctrine and holding that the statute of frauds applies to implied contracts so as to bar actions in *quantum meruit*, did the Court of Appeals of New York by necessary implication give retroactive effect to a statute enacted subsequent to the contract in suit, and thereby violate the constitutional prohibition against the impairment of the obligation of contracts?

(2) Did the decision of the Court of Appeals of New York violate the Contracts Clause or the Due Process Clause of the Fourteenth Amendment, quite apart from the subsequently enacted statute?

Constitutional and Statutory Provisions Involved

United States Constitution:

Article I, section 10, Clause 1:

> "No State shall . . . pass any . . . ex post facto Law, or Law impairing the Obligation of Contracts . . ."

Amendment XIV, Section 1, Clause 2:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws."

Statutes:

New York Personal Property Law § 31(10), L. 1949, c. 203, eff. Sep. 1, 1949; repealed and recodified *in haec verba* as General Obligations Law § 5-701(10), L. 1963, c. 576, eff. Sep. 27, 1964; as amended by L. 1964, c. 561, enacted April 16, 1964, eff. Sep. 27, 1964. To avoid needless repetition, the statute is printed below as it now stands. Matter in italics was added by L. 1964, c. 561, eff. Sep. 27, 1964.

> "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking;
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> "10. Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. *'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction.* This provision *shall apply to a contract implied in fact or in law to pay reasonable compensation but* shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman."

Statement of the Case

The complaint alleges that between September 1963 and March 1964 petitioner performed certain services for respondent Royal Business Funds Corp. and defendant Small Business Investment Corp. by finding a purchaser (Jayark

Films Corp.), for all of the convertible debentures and stock of Colorama Features, Inc., owned by Royal and SBIC. The complaint alleges that "said work, labor and services were reasonably worth the sum of $25,000, which sum the defendants promised and agreed to pay to plaintiff," the traditional method of pleading in *quantum meruit* in New York. *Spring* v. *Moncrieff*, 208 Misc. 671, 675, 144 N.Y.S. 2d 664, 668 (Sup. N. Y. 1955). The second cause of action seeks $5,000 as the reasonable value of petitioner's services to respondent as a "finder", which resulted in the respondent's purchase of 7,200 shares of Jayark stock. A third cause of action is not involved on this petition (A44-50).

Respondent moved to dismiss the complaint pursuant to CPLR 3211(a)(5) (motion for summary judgment) on the ground that the cause of action was barred by the statute of frauds, General Obligations Law § 5-701(10) (A8-15). This motion was denied at Special Term, 47 Misc. 2d 310, 262 N.Y.S. 2d 708 (Sup. N. Y. Co. 1965) (A56-59), and the denial was affirmed by the Appellate Division, First Department, by a 4-1 vote. 25 A. D. 2d 502, 266 N.Y.S. 2d 570 (1966) (A51-55). The Appellate Division on May 5, 1966, granted leave to appeal to the Court of Appeals, 25 A. D. 2d 957 (A4-5), and on December 30, 1966, that Court reversed unanimously, 18 N. Y. 2d 521, 277 N.Y.S. 2d 268, 223 N. E. 2d 793, holding that the statute of frauds was a defense to an action in *quantum meruit*. A motion to reargue, in which petitioner challenged the constitutionality of the Court of Appeals' decision in view of the Contracts Clause (Article I, Section 10) and the Due Process Clause (Amendment XIV, Section 1) of the Constitution was denied with costs and printing disbursements, on March 7, 1967. 18 N. Y. 2d ——. Petitioner has therefore exhausted all remedies available to him under the laws of New York. The remittitur of the Court of Appeals was filed with the Clerk of the Appellate Division on February 20, 1967, and with the New York County Clerk on March 29, 1967.

Reasons for Granting the Writ

This petition presents the important federal question of whether a State may circumvent express constitutional prohibitions against retroactive legislation by the device of giving to prior law a new construction which adopts precisely the changes in that law enacted by a subsequent statute. Specifically, this petition challenges the constitutionality of the decision below because the Court of Appeals of New York necessarily gave retroactive effect to a 1964 amendment to the statute of frauds.

This petition also presents the important constitutional question of whether this Court has unduly restricted the Contracts Clause of the Constitution by holding that it applies only to legislative impairment of the obligations of contracts, although nothing in the language or history of the enactment of that Clause dictates such a result.

ARGUMENT

I

By overturning a century-old doctrine and making the statute of frauds applicable to implied contracts and to actions in *quantum meruit*, the Court of Appeals by necessary implication gave retroactive effect to a subsequently enacted statute and thereby impaired the obligations of contracts entered into prior to its enactment.

The unconstitutionality of the course pursued by the Court of Appeals may be seen by examining the law as it had always been prior to the 1964 amendment, by comparing it with the changes worked by that amendment, and by observing that the decision below adopts precisely the changes worked in prior law by the amendment.

a. The law prior to the 1964 amendment to subdivision 10 of the statute of frauds was that the statute was inapplicable to implied contracts and not a defense to actions in *quantum meruit*.

For over a century it has been the rule in New York that the statute of frauds applies only to express oral contracts within its coverage and not to contracts implied in fact or law; and that a party who has performed services under an express contract void under the statute is nevertheless entitled to recover the reasonable value of such services on the theory of *quantum meruit*, to which action the statute of frauds is no defense. Thus in *Erben* v. *Lorillard*, 19 N. Y. 299, 302 (1859), the Court of Appeals said:

> "The contract being void and incapable of enforcement in a court of law, the party paying the money or rendering the services in pursuance thereof, may treat it as a nullity, and recover the money or the value of the services. This is the universal rule in cases where the contract is void, for any cause not illegal, if the defendant be in default."

The Court of Appeals most recently reaffirmed the rule in *Harmon* v. *Alfred Peats Co.*, 243 N. Y. 473, 476, 154 N. E. 314, 315 (1926):

> "The complaint in the present case is framed in a double aspect. It is broad enough to permit a recovery on an express contract or on *quantum meruit*. So far as a contract is concerned, the Statute of Frauds or the Statute of Limitations would be relevant but not if a recovery be sought on *quantum meruit*. Treating the action as one to recover on *quantum meruit* the Statute of Frauds could not apply."

The foregoing decisions of the Court of Appeals did not go into the theoretical justification for the rule. It may

be observed, however, that New York's separate treatment of *quantum meruit* recoveries under contracts implied in fact or law is not restricted to statute of frauds situations. In *Smith* v. *Kirkpatrick*, 305 N. Y. 66, 71-72, 11 N. E. 2d 209, 212 (1953), the Court of Appeals held that failure to recover on express contract in a prior action was not *res judicata* in a subsequent action on *quantum meruit* because the nature of the two actions is different. The practical justification for allowing recovery in *quantum meruit* for the value of services rendered by him was given in *Spring* v. *Moncrieff*, 208 Misc. 671, 676, 144 N.Y.S. 2d 664, 669 (Sup. N. Y. 1955). The court there said that the purpose of the statute of frauds is to prevent the perpetration of a fraud on a defendant, not to facilitate his commission of one against the plaintiff.

It is also clear that the *Erben* and *Harmon* cases, *supra*, necessarily constitute judicial constructions of the primary decretal paragraph of the statute, and not of any particular subdivision thereof. Prior to 1949 the New York Statute of Frauds was found in Personal Property Law, § 31, which consisted of a decretal paragraph commencing "Every agreement, promise or undertaking is void, unless . . .", and setting forth the attributes of the writing required by it. This paragraph was followed by nine subdivisions which defined the classes of contract to which the decretal paragraph applied. There is nothing in any of the nine pre-1949 subdivisions from which the *Erben-Harmon* construction could have flowed, or to which it could attach. Necessarily, the holdings of those cases decided that "every agreement, promise or undertaking" of the decretal paragraph means every "express agreement, promise or undertaking is void."

In 1949 the New York Law Revision Commission recommended an amendment to the statute of frauds so as to extend its application to the contracts of business brokers by adding a tenth subdivision to Personal Property Law,

§ 31. The stated rationale of the proposed amendment to the existing statute of frauds is set forth in the "Note" appended to the bill by the Commission, N. Y. Leg. Doc. (1949) No. 65 (G), at page 613:

> "Its purpose is to provide that contracts or agreements for the compensation of business brokers must be evidenced by a memorandum in writing and signed by the party to be charged."

The Commission's "Recommendation" amplified the need for and purpose of the proposed amendment, *id.*, at 615:

> "The nature of the transactions is such that, in the absence of the requirement of a writing, unfounded and multiple claims for commissions are frequently asserted, and employers often seek to escape liability by denying the fact of employment. These controversies are commonly resolved by juries on conflicting testimony, with the consequent danger of erroneous verdicts.
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> "The Commission believes that *the Statute of Frauds, Section 31 of the Personal Property Law, should be made applicable to contracts for compensation for services rendered in the sale of a business opportunity, business, or interest therein.*" (Emphasis supplied.)

The emphasized portion of the foregoing quotation demonstrates that in 1949 neither the Commission nor the Legislature considered that the amendment would do more than carry over the provisions of section 31, and the judicial construction which had been given to it, to a new class of contracts. Certainly nothing in either the "Recommendation" or the "Study" prepared for the Commission by its research consultant, Professor Braucher of Harvard, suggests even remotely that there was any intention to abolish with respect to the proposed subdivision the traditional rule that the statute as a whole did not apply to implied

contracts or that it was a defense to actions in *quantum meruit*. The Court of Appeals' statement, 18 N. Y. 2d at 526, 277 N.Y.S. 2d at 271, 223 N. E. 2d at 795, that the matter had been considered in the "Study" is simply in error.*

It was therefore highly predictable that subdivision 10 would receive the same construction as had the preceding subdivisions, and would be held to be inapplicable to implied contracts and no bar to recovery in *quantum meruit*. Decisions since 1949 which have so held, in addition to the lower court decisions in this case, include the following:

Gibson v. *Archer Productions, Inc.*, 281 App. Div. 661, 117 N.Y.S. 2d 438 (1st Dept. 1952);

Wells v. *Dent*, 4 A. D. 2d 307, 164 N.Y.S. 2d 646 (4th Dept. 1957), *leave to appeal denied*, 4 A. D. 2d 930, 167 N.Y.S. 2d 901;

Schrier v. *Kelloggs Pure Foods, Inc.*, 205 Misc. 767, 133 N.Y.S. 2d 751 (City Ct. N. Y. 1954);

Spring v. *Moncrieff*, 208 Misc. 671, 144 N.Y.S. 2d 664 (Sup. N. Y. 1955);

Black v. *Fisher*, 145 N.Y.S. 2d 142 (Sup. Bronx 1955) (n/o/r);

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* Prof. Braucher's "Study" did note, Leg. Doc. (1949) No. 65 (G) at pp. 629-30, that in some other jurisdictions real estate brokers' statutes of frauds have been construed so as to bar recoveries in *quantum meruit*, lest the purpose of the statute be defeated. See, *e.g.*, Hale *v.* Kreisel, 164 Wisc. 271, 215 N. W. 227 (1927); Leimbach *v.* Regner, 70 N.J.L. 608, 57 Atl. 138 (1904); Blair *v.* Austin, 71 Neb. 401, 98 N. W. 1040 (1904). But the statutes of frauds of these states, and of Oregon, unlike that of New York, seem to apply to implied contracts by requiring that the promised compensation be stated in the writing, so that recovery in *quantum meruit* would indeed subvert the statute. While some other states have followed the Wisconsin-New Jersey rule, we submit they have done so without justification based upon their respective statutes. In any event, this statement by Prof. Braucher must be deemed applicable to the proposed real estate brokers' statute of frauds, which was not enacted. There was and is no other statute of frauds anywhere, dealing with business brokers.

Brand v. *Gromet*, 3 Misc. 2d 991, 148 N.Y.S. 2d 613 (Sup. Bronx 1956);

Blair v. *Weininger*, 155 N.Y.S. 2d 203 (Sup. N. Y. 1956) (n/o/r);

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Ames v. *Ideal Cement Co.*, 37 Misc. 2d 883, 235 N.Y.S. 2d 622 (Sup. N. Y. 1962);

Braverman v. *Metropolis Bowling Centers, Inc.*, 36 Misc. 2d 244, 232 N.Y.S. 2d 44 (Sup. Kings 1962), *aff'd on other grounds*, 18 A. D. 2d 1089, 239 N.Y.S. 2d 581 (2nd Dept. 1963).*

b. The 1964 amendment to subdivision 10 of the statute of frauds made it applicable to implied contracts and abolished the distinction between "finders" and "brokers", but was not intended to be retrospective.

In *Ames* v. *Ideal Cement Co.*, 37 Misc. 2d 883, 891, 235 N.Y.S. 2d 622, 630 (Sup. N. Y. 1962), a case involving subdivision 10, Justice Geller followed the uniform New York rule, but he criticized its logic and called for legislative revision. The Law Revision Commission thereupon secured a new "Study" from Professor Braucher, and recommended an amendment to subdivision 10. The new "Study" and the Commission's own "Recommendation" somewhat peevishly complained that the intermediate appellate courts had misconstrued the intention of the 1949

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* Two or three early cases had pointed the other way, Graymount *v.* Schlemmer, 204 Misc. 667, 127 N.Y.S. 2d 177 (Sup. N. Y. 1953), *aff'd on other grounds*, 283 App. Div. 859, 130 N.Y.S. 2d 156 (1st Dept. 1954) (decided at Special Term without the citation of Gibson *v.* Archer, *supra*); Schwartz *v.* Mayer, 198 Misc. 210, 97 N.Y.S. 2d 773 (Mun. Ct. Bronx 1950); and Shapiro *v.* Bromberg, 198 Misc. 213, 97 N.Y.S. 2d 777 (Mun. Bronx 1950) (which are distinguishable). They have not been followed by the New York courts.

Commission and Legislature, and proposed an amendment to make subdivision 10 applicable to contracts implied in fact or law. The Commission stated that the amendment was recommended "to make clear that no recovery on a quantum meruit theory *was* intended" under the 1949 statute (Emphasis added). Leg. Doc. (1964) No. 65 (F), at page 169. The Court of Appeals stressed these self-serving declarations of the Commission and its consultant, 18 N. Y. 2d at 525-26, 277 N.Y.S. 2d at 270-271, 223 N. E. 2d at 795, despite the fact that in the fifteen years which intervened between the enactment of subdivision 10 and the enactment of the amendment, the entire membership of the Commission had changed, and that under Legislative Law, Art. 4-A, § 72(4), the Commission has no power to "clarify" prior law, but only to recommend "changes in the law".

The amendment also abolished the distinction between "brokers", who negotiate the terms of the transaction as agents of their principles (usually the sellers), and "finders", who merely originate or propose a transaction (usually to the buyer), and may introduce the principals, but who are not employed to negotiate. This latter distinction was made by the Court of Appeals in *Knauss* v. *Gottfried Krueger Brewing Co.*, 142 N. Y. 70, 36 N. E. 867 (1894); *Seckendorff* v. *Halsey Stuart & Co.*, 234 App. Div. 61, 254 N. Y. Supp. 250 (1st Dept. 1931), *aff'd in part and rev'd in part on other grounds*, 259 N. Y. 353, 182 N. E. 14 (1932); *cf. Sibbald* v. *Bethlehem Iron Co.*, 83 N. Y. 378 (1881), and had been followed with respect to subdivision 10 because, though the 1949 Recommendation had spoken of making Personal Property Law § 31 "applicable to contracts for compensation for services rendered in the sale of a business . . ." Leg. Doc. (1949) No. 65 (G), at page 615, as enacted, the subdivision was applicable only to contracts "to pay compensation for services rendered *in negotiating* a loan . . ." etc. (Emphasis supplied). *Wells* v. *Dent*, 4 A. D. 2d 307, 164 N.Y.S. 2d 646 (4th Dept.

1957); *Braverman* v. *Metropolis Bowling Centers, Inc.*, 18 A. D. 2d 1089, 239 N.Y.S. 2d 581 (2nd Dept. 1963); *Ames* v. *Ideal Cement Co.*, 37 Misc. 2d 883, 235 N.Y.S. 2d 622 (Sup. N. Y. 1962); *Kuffler* v. *List*, 144 F. Supp. 776 (S.D.N.Y. 1956); *cf., Lindeman* v. *Textron, Inc.*, 229 F. 2d 273 (2 Cir. 1956).

It must be stressed however, that there was a five-month hiatus between the enactment of the 1964 amendment and its effective date. The amendment, enacted on April 16, 1964, was to General Obligations Law § 5-701(10), which was not to become effective until September 27, 1964. Personal Property Law § 31(10), which remained in effect until September 27, 1964, was never amended. The 1964 amendment was thus necessarily prospective, and this indicates that the 1964 Legislature recognized that it was making a change in the law.

c. In adopting as part of its putative construction of subdivision 10 of the statute of frauds, as originally enacted, the precise two changes worked by the 1964 amendment, the Court of Appeals by necessary implication gave retroactive effect to that amendment, in violation of the Contracts Clause of the Constitution.

In reversing below, the Court of Appeals gave to the 1949 edition of subdivision 10 a construction which embraced precisely the two substantive changes wrought in that statute by the 1964 amendment. Although in doing so the Court below purported to be guided to its decision solely by the putative intention of the 1949 Legislature and Law Revision Commission, unaided by subsequent legislative developments, it nevertheless clearly violated the Constitution. In *Cross Lake Shooting & Fishing Club* v. *Louisiana*, 224 U.S. 632, 638-39 (1912), this Court said of the Contracts Clause:

> "It does not reach mere errors committed by a state court when passing upon the validity or effect of a contract under the laws in existence when it was made.

> And so, while such errors may operate to impair the obligation of the contract, they do not give rise to a Federal question. *But when the state court, either expressly or by necessary implication, gives effect to a subsequent law of the State whereby the obligation of the contract is alleged to be impaired, a Federal question is presented.*" (Emphasis supplied).

In *Tidal Oil Co.* v. *Flanagan, supra,* 263 U. S. 444 (1924), this Court denied the claim of constitutional infringement, but recognized that facts similar to those present in the case at bar would support a claim of constitutional infringement, 263 U. S. at 453:

> "Then there are cases like *McCullough* v. *Virginia,* 172 U. S. 102; *Houston & Texas Central R.R. Co.* v. *Texas,* 177 U. S. 66, 76, 77; *Hubert* v. *New Orleans,* 215 U. S. 170, 175; *Carondelet Canal Co.* v. *Louisiana,* 233 U. S. 362, 376, and *Louisiana Ry. & Nav. Co.* v. *New Orleans,* 235 U. S. 164, 171. In each of them the judgment of the State Supreme Court seemed from its opinion merely to be a reversal of a previous construction by it of a statute upon the faith of which the contract had been made. In fact, however, the judgment merely gave effect to an existing subsequent statute impairing the obligation of the contract which was thus a law passed in violation of Article I, § 10."

Such a case was *Terre Haute & I.R.R.* v. *Indiana* ex rel. *Ketchum,* 194 U. S. 579, 587 (1904), which is strikingly similar to that at bar. In that case this Court held unconstitutional a decision of the Supreme Court of Indiana because it necessarily gave effect to a subsequently enacted statute of the State although purporting merely to reinterpret an antecedent corporate charter. There Mr. Justice Holmes, speaking for a unanimous Court, said:

> "In this way the amendment of § 23 in 1897 is practically carried into effect. While repudiated as legisla-

tion it is adopted by construction, and is found to express only the meaning of the original act.

"We are driven to a different construction of the charter, notwithstanding the deference naturally felt for the decision of a state court upon state laws. The language is plain. . . ."

Continuing at page 589, the Court said:

"The case then stands thus: The state court has sustained a result which cannot be reached, except on what we deem a wrong construction of the charter, without relying on unconstitutional legislation. It clearly did rely upon that legislation to some extent, but exactly how far is left obscure. We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the state court put forward the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this court."

d. That the decision below is not an independent judicial construction of subdivision 10 of the statute of frauds as enacted in 1949 is shown by the fact that in reaching it the Court of Appeals abandoned several fundamental rules of construction.

As Justice Holmes noted in the *Ketchum* case, *supra,* it may be extremely difficult in any given case to determine to what extent, if at all, the state court gave effect to a subsequent statute in impairing the obligations of contracts antedating its enactment. It is of course entirely possible that had there been no amendment in 1964, the Court might nonetheless have arrived at the same result as it has with the aid of the amendment, in which case this Court's traditional construction of the Contracts Clause would make the Court of Appeals' decision immune to attack

thereunder. We shall never know. As the situation actually stands, although the Court below purported merely to reconstrue the 1949 enactment, by necessary implication it gave effect to the 1964 amendment and to the hostility to business brokers and "finders" felt by much of the "respectable" business community which appears to have animated the amendment's adoption. We respectfully submit that the decision below too faithfully reproduces the mandate of the 1964 amendment, in violation of all canons of construction traditionally adhered to by the Court of Appeals, to be merely an independent judicial construction of the 1949 statute.

In the first place, the two changes in the construction given to subdivision 10 (of the 1949 statute), *viz.*: (1) extending the application of the statute of frauds to implied contracts by barring recoveries in *quantum meruit*, and (2) abolishing the distinction between "brokers" and "finders", are the precise and sole changes worked by the 1964 amendment to subdivision 10. Just as the amendment in terms applies only to subdivision 10, so also does the Court's decision appear to be limited to a construction of that subdivision, although nothing in the 1949 enactment itself suggests that it be treated differently from subdivisions 1 to 9.

Secondly, the Court's opinion devotes an inordinate amount of discussion to the Law Revision Commission's 1964 Report and to its stated intention merely to "clarify" what was allegedly intended in 1949. 18 N. Y. 2d at 525-26, 277 N.Y.S. 2d at 270-71, 223 N. E. 2d at 795.

Finally, in overruling the construction previously given the 1949 statute by the courts and the Legislature, the Court of Appeals violated several principles of construction to which it has adhered over the years. This was done without the citation of a single authority. The only decisions cited in Judge Keating's opinion for the Court are those which are now overruled by it.

In reaching the decision below, the Court of Appeals abandoned (presumably solely *pro hac vice*) at least four fundamental principles of construction: (1) that long-standing constructions of law will not be judicially overturned, particularly in contract and property cases where there may have been justifiable reliance on them, and any change should be left to the Legislature; (2) that the Legislature has no power to decree what construction shall be given to prior statutes, particularly where the construction is contrary to that which the statute would ordinarily have received; (3) that "Studies" prepared for the Law Revision Commission are entitled to no greater credit than that which any comparable memorandum of law would be entitled to receive; and (4) that the Legislature is presumed to know the construction which has previously been given to words and phrases which it uses in new legislation.

(1) On the reversal of long-standing judicial constructions, the Court of Appeals has refused to sanction abandonment of judicially created rules of long-standing although it has itself previously questioned their reasonableness, *Purcell* v. *Long Island Daily Press Publ. Co.*, 9 N. Y. 2d 255, 213 N.Y.S. 2d 425, 173 N. E. 2d 865 (1961), preferring instead to leave any change to be made by the Legislature. And the Court has also held, *Simonson* v. *International Bank*, 14 N. Y. 2d 281, 251 N.Y.S. 2d 433, 200 N. E. 2d 427 (1964), that where the Legislature had in fact mandated a change in a rule for the future, it is improper for the courts to give such change retrospective application.

(2) On legislative expressions of prior intent, the Court of Appeals said in *Roosevelt Raceway* v. *Monaghan*, 9 N. Y. 2d 293, 304, 213 N.Y.S. 2d 729, 735, 174 N. E. 2d 71, 75 (1961):

> "The Legislature has no power to declare, retroactively, that an existing statute shall receive a given

> construction when such a construction is contrary to that which the statute would ordinarily have received."

Accord, *Mutual L. Ins. Co.* v. *Supervisors,* 16 N. Y. 424, 431-32 (1857). Compare, *Chatlos* v. *McGoldrick,* 302 N. Y. 380, 98 N. E. 2d 567 (1951), where the 1951 Legislature enacted an amendment to a 1950 statute by which it adopted the construction which had already been placed by the courts on the earlier statute.

(3) On the status of "Studies" prepared for the Law Revision Commission, the Court of Appeals said in *Schwarz* v. *General Aniline & Film Corp.,* 305 N. Y. 395, 402, 113 N. E. 2d 533, 536 (1953), that remarks in such "Studies" are not to be taken as expressions of the intention either of the Commission or of the Legislature:

> "But that was a mere comment by the writer of a study made for the commission, referring to a contention made, or which might be made by somebody else that the section might be applicable in a criminal cause. There is nothing to indicate that the Legislature, or, indeed, the Law Revision Commission, ever had any such thing in mind."

And see, Fuld, "The Commission and the Courts", 40 Corn. L. Q. 646, 662-63 (1955); MacDonald, "Foreward to the Symposium", 40 Corn. L. Q. 641-42 (1955); MacDonald, "Legal Research Translated into Legislative Action," 48 Corn. L. Q. 401, 404, n. 18 (1963).

(4) On the presumption that the Legislature knows the meaning of words and phrases used in prior law, the Court of Appeals said in *Feder* v. *Caliguira,* 8 N. Y. 2d 400, 404, 208 N.Y.S. 2d 970, 972, 171 N. E. 2d 316, 317 (1960), that "It is a fair deduction that the Legislature did not intend a meaning. . . different from that already given it by the courts." And see, Matter of *Delmar Box Co., Inc.,*

309 N. Y. 60, 66, 127 N. E. 2d 808, 812 (1955); *RKO Theaters, Inc.* v. *City of New York*, 308 N. Y. 493, 500, 127 N. E. 2d 284, 287 (1955). It may also be presumed that when the Legislature inserts a new provision into an existing statute, it intends the old and the new to be treated *in pari materia*, and given the same construction. *Schwarz* v. *General Aniline & Film Corp., supra*, 305 N. Y. at 402-03, 113 N. E. 2d at 535-36 (1953). On this principle, the Legislature is presumed to have known when it enacted subdivision 10 to be added to section 31 of the Personal Property Law, that it would apply only to express oral contracts, and would not constitute a defense to an action in *quantum meruit*, which is the construction which had been given to section 31 previously. *Harmon* v. *Peats Co.*, 243 N. Y. 473, 476, 154 N. E. 314 (1926). That was also precisely what the 1949 Law Revision Commission said was intended when it recommended that "the Statute of Frauds, Section 31 of the Personal Property Law, should be made applicable to contracts for compensation for services rendered in the sale of a business opportunity, business, or interest therein." Leg. Doc. (1949) No. 65 (G), at page 615.

All of the foregoing rules of construction have been abandoned by the Court of Appeals in its determination to give to the 1964 amendment to the statute of frauds the retrospective application which the Legislature carefully avoided giving it.

e. The decision below violates the Constitution even though the Court of Appeals itself never previously construed subdivision 10 of the statute of frauds.

On the motion for reargument in the Court below the respondent argued that since the decision below was the first construction of subdivision 10 by the Court of Appeals, it could not be deemed to be a change of construction, but was merely the normal exercise of a higher court's power and duty to correct errors made by lower courts, and, to deny to the Court of Appeals the power to overrule

decisions of the Appellate Divisions, no matter how old, was to make them and not it supreme in New York. See, *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673 682 nt. 9 (1930). This argument presupposes that there is no law in a State until its highest court has spoken, but, as this Court said in another context in *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223, 236 (1940):

> "A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them."

Furthermore, petitioner's contention is that the decision below overturned *pro tanto* the Court of Appeals' own construction of the decretal paragraph of the statute of frauds. This contention stands notwithstanding that the Court below never previously had occasion to construe subdivision 10 in particular since the holding that the statute of frauds is inapplicable to contracts implied in fact or law derives not from anything contained in the language of the ten subdivisions of the statute (which merely catalogue the transactions to which the statute applies), but rather from the language of the decretal paragraph, which is applicable in common to all ten subdivisions.

In addition, this Court said in *Taylor* v. *Ypsilanti*, 105 U. S. 60, 70-71 (1881), that it is a relevant datum that a particular construction of a state statute has been "expounded by all departments of its government." The implication is that once the Legislature has ratified a construction (or perhaps incorporated a rule of common law, in whole or in part into a legislative enactment) the State's highest court may lose some of its freedom or power to alter the pre-existing rule. This has also been the rule in New York. *Fox* v. *Western New York Motor Lines, Inc.*, 257 N. Y. 305, 308-09, 178 N. E. 289, 290 (1931). In the

case at bar, the 1964 Legislature knew the construction which the Appellate Divisions had given to subdivision 10 and consciously overturned it for the future, which constitutes at least an implicit recognition that the construction which had been given the statute for some fourteen years was "the law" of New York. No attempt was made by the Legislature to "clarify" the prior law, *cf., Chatlos* v. *McGoldrick,* 302 N. Y. 380, 98 N. E. 2d 567 (1951), even assuming it could constitutionally have done so. But see, *Ralph* v. *Cronk,* 150 Misc. 69, 268 N. Y. Supp. 429 (Sup. Erie 1934); *aff'd,* 241 App. Div. 907, 271 N. Y. Supp. 1042 (4th Dept. 1934); *aff'd,* 266 N. Y. 428, 195 N. E. 139 (1934).

But the most fundamental defect in respondent's argument lies in the fact that this petition's main thrust is not to challenge the power of the Court of Appeals to overrule the intermediate appellate courts. It challenges the Court of Appeals' power to give effect to a subsequent statute. Enough has already been said on that point, and the Court is respectfully referred again to the discussion of the part which the 1964 amendment necessarily played in the Court of Appeals' reasoning, *ante,* pages 10-12; 14-18.

f. The decision below violates the Constitution even though it may merely do away with a remedy and not a right.

The Court of Appeals has never determined whether the statute of frauds destroys the right or merely denies a remedy. *Rubin* v. *Irving Trust Co.* 305 N. Y. 288, 298, 113 N. E. 2d 424, 427 (1953). When a State's action is challenged under the Contracts Clause or the Due Process Clause, the outright abolition of all remedy has the same constitutional effect as the extinguishing of the right, as this Court noted in *Butz* v. *City of Muscatine,* 8 Wall. 575, 584 (1869):

> "Here the remedy is taken away; not by a subsequent repeal, but by subsequent judicial decisions. The effect

upon the contract is the same as if the provisions of the code had been repealed. . . ."

In constitutional questions realities will not be subordinated to the subtle theoretical distinction between right and remedy. "The Constitution is 'intended to preserve practical and substantial rights, and not to maintain theories.'" *Faitoute Iron & Steel Co.* v. *Asbury Park,* 316 U. S. 502, 514 (1942). When a remedy is *totally* destroyed, the right itself becomes merely theoretical. *Home Bldg. & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398, 430-31 (1934). *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill,* 281 U. S. 673, 682 (1930). Compare, *El Paso* v. *Simmons,* 379 U. S. 497, 514 (1965), where the Court held that a limitation of a *peripheral* right or remedy did not impair the Contracts Clause because "it was not the central undertaking of the seller nor the primary consideration for the buyer's undertaking."

Since the Court of Appeals clearly did rely on the 1964 amendment to the statute of frauds to some extent, its decision impaired the Contracts Clause of the Constitution under this Court's traditional exposition of that Clause, and must be reversed.

II

The decision below violates the Constitution even apart from the 1964 amendment.

Petitioner also contends that, even had there been no amendment of the statute of frauds in 1964, the decision of the Court of Appeals below would violate either the Contracts Clause or the Due Process Clause of the Fourteenth Amendment, or both.

a. The decision below impairs the obligations of contracts entered into on the faith of the law as it had theretofore been declared by the courts of New York.

In *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, 451 (1924), this Court held that the language of the Contracts Clause, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts," dictates that for the impairment to violate that Clause, it must result from legislative action and not merely from a change in judicial construction. We respectfully urge the Court to reconsider this doctrine because the foregoing limitation of the Contracts Clause finds no warrant in the Constitution itself, and is probably contrary to the intention of the Framers. There is little contemporaneous documentation as to whether the Framers had given any thought to the possibility of judicial impairments of contracts. Madison's notes of the Constitutional Convention are silent on the point, see "Documents Illustrative of the Formation of the Union," House Doc. 398, 69th Cong., 1st Sess. (1927), p. 728, and although the *Federalist,* No. XLIII, Dawson ed., N. Y. 1863, does appear to treat the Contracts Clause as though it were restricted to legislation, there was no contemporary reason why it should not have done so.

It is important to note that there was no occasion for the Framers of the Constitution to have spelled out a prohibition against impairments of contracts by the reversal of prior judicial decisions. These men must be presumed to have drafted the Contracts Clause in the light of their experience as former British subjects and their knowledge that a decision of the House of Lords on a point of law could not be overruled by that House, but could be changed solely by Act of Parliament. In *London Street Tramways Co. Ltd.* v. *London City Council,* L. R. [1898] A. C. 375, 379, the Lord Chancellor (Halsbury) said:

> ". . . a decision of this House once given upon a point of law is conclusive upon this House afterwards, and

that it is impossible to raise that question again as if it was res integra and could be reargued, and so the House be asked to reverse its own decision. *That is a principle which has been, I believe, without any real decision to the contrary, established now for some centuries,* and I am therefore of opinion that in this case it is not competent for us to rehear and for counsel to reargue a question which has been recently decided." (Italics supplied)

And see, *Beamish* v. *Beamish,* 9 H. L. Cas. 274 (1859). The binding nature of *stare decisis* in Great Britain continued until last year when, on July 26, 1966, Lord Chancellor Gardiner, speaking for himself and the Lords of Appeal in Ordinary announced the relaxation of the rule. "Judicial Precedent", H. L. WEEKLY HANSARD, No. 629, page 679; N. Y. TIMES, July 27, 1966, page 1.

The existence of concurrent federal and state jurisdictions and of written constitutions made the rigid adherence to *stare decisis* inappropriate in this country, but at the time the Constitution was drafted the Framers could not have been expected to anticipate that development. When they wrote, they could not have intended by their silence to give sanction to judicial impairments of contracts.

The holding that the Contracts Clause affects legislative action only must depend either on the use in that Clause of the word "Law" or on the use of the word "pass". If the conclusion is dictated by the word "Law", it is now clear that in the understanding of the Constitution's contemporaries, that word was not limited to statute law. Thus, section 34 of the Judiciary Act of 1789, 1 Stat. 92, Sep. 24, 1789, uses the phrase "the laws of the several States." In *Swift* v. *Tyson,* 16 Pet. 1 (1842), Mr. Justice Story construed that use of the word "laws" to apply solely to the statutory law of the states. His construction has since been overruled by this Court, *Erie R.R.* v. *Tompkins,* 304 U. S. 64 (1938), largely on authority of Professor Charles

Warren's historical research, "New Light on the History of the Federal Judiciary Act of 1789," 37 Harv. L. Rev. 49, 81-88 (1924). Professor Warren was able to show from a theretofore lost manuscript draft of the Judiciary Act that the phrase "the laws of the several States" had been substituted for the more cumbersome

> "the Statute law of the several States in force for the time being and their unwritten or common law now in use, whether by adoption from the common law of England, the ancient statutes of the same or otherwise."

The conclusion logically followed that, as used in section 34, the word "laws" must have been intended to embrace common law. *Erie R.R.* v. *Tompkins,* 304 U. S. 64 (1938).

Since the Judiciary Act of 1789 was S.1 of the first session of the First Congress, roughly contemporaneous with the ratification of the Constitution, and was drafted by members of the Congress some of whom at least had also been members of the Constitutional Convention (Madison was then a member of the House of Representatives), the understanding of the Congress as to the meaning of a word which had been used in the Constitution may be the strongest indication of what the Framers of the Constitution themselves understood and intended. There is therefore every reason to assume that the word "Law" in the Contracts Clause was intended to embrace common law, or would have been so intended had the Framers considered the problem.

To the extent that this Court's restriction of the Contracts Clause to legislatively induced impairments may have been dictated by the use in that Clause of the word "pass" ("No State shall . . . pass any . . . Law"), this Court's recent decision in *Bouie* v. *City of Columbia,* 378 U. S. 347, 353-54 (1964), eliminates the obstacle. The Court there struck down as unconstitutional a purely judicial redefinition of a criminal statute though there had

been no intervening legislation. The *Ex Post Facto* Clause and the Contracts Clause both appear in Article I, Section 10, and are separated solely by a comma. Both are introduced by the same word "pass". The reasoning of the Court in *Bouie* would thus support a violation of the Contracts Clause by a purely judicial impairment of a contract. Compare, *Cross Lake Shooting & Fishing Club* v. *Louisiana*, 224 U. S. 632, 638-39 (1912).

It would be particularly fitting for the Court now to remove the limitation heretofore placed on the Contracts Clause. When that limitation was enunciated, the federal courts were free to disregard the most recent pronouncement of state law by a state court "where gross injustice would otherwise be done." *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 452 (1924). Since *Erie R.R.* v. *Tompkins* 304 U. S. 64 (1938), the federal courts must now dutifully follow every twist and turn of state jurisprudence, although doing so may require reversal even of judgments that were correct when rendered. *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538 (1941). On the faith of the decision below, the Court of Appeals for the Second Circuit reversed a judgment which it conceded was correct (on the statute of frauds point) when rendered, and even refused to grant a petition for rehearing based upon a challenge to the constitutionality of the decision of the Court below. *Lee* v. *St. Joe Paper Co.*, 371 F. 2d 797 (2 Cir. 1967), *petition for cert. pending*, No. . Thus *Erie R.R.* v. *Tompkins*, *supra*, may have the result of compelling a federal court to carry out an unconstitutional impairment of contract.

b. The decision below deprives persons of their property without due process of law, in violation of the Fourteenth Amendment.

In *Bouie* v. *City of Columbia*, 378 U. S. 347, 353-54 (1964), this Court said:

> "If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a

> State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."

Cf., Brinkerhoff-Faris Trust & Sav. Co. v. *Hill,* 281 U. S. 673, 679-80 (1930).

It would unduly extend the length of this Petition to cite every case in which this Court has recognized that there exist certain fundamental and inalienable rights, the withholding or destruction of which constitutes a deprivation of life, liberty, or property without due process of law, within the meaning of the Due Process Clause of the Fourteenth Amendment. Most of the rights which have thus been held to be incorporated into the Due Process Clause have had their genesis in the Bill of Rights, which was of course originally directed against the General Government. The genesis of the right is immaterial for purposes of incorporation into the Fourteenth Amendment —what appears to matter is how fundamental the right is. *Bouie* v. *City of Columbia, supra,* shows that the right which is protected from legislative infringement by the *Ex Post Facto* Clause is so basic and fundamental a right of free men that its abrogation by judicial action, without more, constitutes a denial of due process within the meaning of the Fourteenth Amendment. In his dissenting opinion in *El Paso* v. *Simmons,* 379 U. S. 479, 522-23 (1965), Mr. Justice Black pointed out that the prohibitions against state bills of attainder, *ex post facto* laws and impairments of contract are three "of the few provisions which the Framers deemed of sufficient importance to place in the original Constitution," and that they are directed to the prevention of different forms of the same evil:

> "All three of these provisions reflect the strong belief of the Framers of the Constitution that men should not have to act at their peril, fearing always that the State might change its mind and alter the legal con-

sequences of their past acts so as to take away their lives, their liberty or their property."

And these "inalienable rights" of "life, liberty and property" are in terms protected by the Due Process Clause of both the Fifth and Fourteenth Amendments to the Constitution. Thus, the decision below violates the Due Process Clause of the Fourteenth Amendment and should be reversed.

III

The questions raised by the decision below have importance beyond the rights of the petitioner alone.

The questions raised by this petition far transcend the individual rights of this petitioner. He is only one of several individuals whose previously accrued rights have been abolished by the Court below, none of whom will have any remedy if this Court denies *certiorari* in the present case.* This is not a case like *Rice* v. *Sioux City Mem. Cemetery, Inc.*, 349 U. S. 70 (1955), in which this Court dismissed as improvidently granted a petition for *certiorari* after intervening corrective legislation had deprived the case of "substance" by making the petitioner there the sole individual in Iowa who was in a position to complain of the prior law. Here the petitioner and others similarly situated complain of the retroactive application of the law as it now is, and not of the application of the law as it was but is no longer.

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* In the Court below the respondent informed the Court of eight pending cases other than that at bar in which subdivision 10 is involved. Petitioner knows of at least four others, either presently in suit or not barred by limitations, and all arising prior to the effective date of the amendment to the statute. In one case, Lee *v.* St. Joe Paper Co., 371 F. 2d 797 (2 Cir. 1967), a judgment for plaintiff has been reversed on authority of the decision below. In another, MacEwen *v.* Star-Kist Foods, Inc., E.D.N.Y. Index No. 64 C. 425, plaintiff has been forced to settle for a miniscule percentage of his claim. The other cases will doubtless be dismissed in short order.

The most serious question raised by the petition, however, and one which wholly overshadows either the rights of the petitioner or the statute of frauds itself, is whether the several States will be permitted to regard the decision below as a sanction for them to achieve results which the Constitution expressly prohibits them from achieving directly, by the device of giving to prior law a new construction which adopts precisely the changes in that law enacted by a subsequent statute.

Whatever approach the Court may take, it should be manifest that the New York Court of Appeals rode roughshod over the petitioner's rights. In 1963, when he proposed the acquisition in suit to the respondent, both parties knew or are presumed to have known that if a deal eventuated, petitioner would be entitled to recover the reasonable value of his services, although he may have failed to reduce his actual agreement with respondent to a writing compliant with the statute of frauds. However, when petitioner came to enforce his rights by the means which had always been deemed appropriate and sufficient to that end, he was told by the Court of Appeals that the law was always to the contrary and that he had neither right nor remedy.

CONCLUSION

The petition for certiorari should be granted and the decision below reversed as repugnant to the Constitution of the United States.

Respectfully submitted,

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